

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2  
3 ALVIN ALEXANDERSON, DRAGONSLAYER,  
4 INC. and MICHELS DEVELOPMENT LLC.

NO. 04-2-0008

5 Petitioners,

**ORDER FINDING CONTINUING  
NON-COMPLIANCE**

6 v.

7 CLARK COUNTY

8  
9 Respondent.

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11  
12 This Matter comes before the Board upon a compliance hearing held telephonically on  
13 February 7, 2008. Richard Lowry, Chief Civil Deputy Prosecuting Attorney, appeared for  
14 Clark County. Eric Merrifield and Patrick Ryan appeared for Petitioners. All three Board  
15 members attended, Margery Hite presiding.  
16

17 **SYNOPSIS**

18 In this order, the Board finds that Clark County continues to be in non-compliance with  
19 respect to the Memorandum of Understanding with the Cowlitz Indian Tribe (MOU) that the  
20 County has adopted, as a *de facto* comprehensive plan amendment. Although this Board  
21 had originally found that the MOU was not subject to Board jurisdiction, the Court of  
22 Appeals, Division II, found that the MOU constitutes a *de facto* comprehensive plan  
23 amendment and the Board has thereafter required compliance of the MOU with the GMA as  
24 a comprehensive plan amendment. County Resolution No. 2008-01-18 does not cure the  
25 non-compliance since it neither repeals the MOU nor does it adopt it in accordance with the  
26 public participation requirements of the Growth Management Act (GMA), Ch.36.70A. RCW.  
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29 **PROCEDURAL HISTORY**

30 The Petition for Review in this case was filed on May 3, 2004 and challenged the adoption  
31 of Clark County Resolution No. 2004-03-02. That resolution approved the Memorandum of  
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1 Understanding (the MOU) between the County and the Cowlitz Indian Tribe concerning  
2 certain property that the Tribe seeks to have placed into trust status. The MOU was adopted  
3 to address use of the property once it is no longer in the County's jurisdiction by virtue of its  
4 trust status. On July 23, 2004, this Board entered an order dismissing the petition based  
5 on lack of subject-matter jurisdiction.<sup>1</sup> The Board's order was appealed to the Thurston  
6 County Superior Court. The Superior Court affirmed the Board.<sup>2</sup> Petitioners then appealed  
7 to the Court of Appeals, Division II. The Court of Appeals reversed the Board's  
8 determination that it lacked subject-matter jurisdiction on the basis that the MOU constitutes  
9 a *de facto* comprehensive plan amendment.<sup>3</sup> The case was remanded to the Board and on  
10 June 15, 2007, this Board found, among other things, that "Clark County did not provide for  
11 early and continuous public participation in the adoption of the MOU in violation of RCW  
12 36.70A.020(11), RCW 36.70A.035, and RCW 36.70A.140 and Clark County Code  
13 Ch. 40.560."<sup>4</sup>

16 This latest decision of the Board was also appealed by the County. The Thurston County  
17 Superior Court has again affirmed the Board<sup>5</sup> and appeal is pending before the Court of  
18 Appeals.<sup>6</sup>

20 On January 29, 2007, the Clark County Board of Commissioners adopted Resolution No.  
21 2008-01-18.<sup>7</sup> It provides:

23 Unless the Hearing Board's June 19, 2007 Order on Motion on Remand is overturned  
24 on further appellate court review, Clark County will not seek to implement or enforce  
25 its provisions.<sup>8</sup>

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27 <sup>1</sup> Order on Motion for Dismissal, July 23, 2004.

28 <sup>2</sup> Alvin Alexanderson; Dragonslayer, Inc.; and Michels Development, LLC v. the Board of Clark County  
29 Commissioners and the Western Washington Growth Management Hearings Board, Thurston No. 04-2-  
01723-5(July 1, 2005)

30 <sup>3</sup> *Alexanderson v. Board of County Commissioners*, 135 Wn. App. 541 (2006)

31 <sup>4</sup> Order on Motions on Remand, June 15, 2007 at 5.

32 <sup>5</sup> Order Affirming Decision of the Growth Management Hearings Board, Thurston County Superior Court  
Cause No. 07-2-01398-6, December 14, 2007.

<sup>6</sup> Clark County Compliance Hearing Memorandum at 1 and Exhibit 3.

<sup>7</sup> Exhibit 4 to Clark County Compliance Hearing Memorandum.

1 Based on the adoption of Resolution No. 2008-01-18, the County seeks a finding of  
2 compliance.<sup>9</sup>

### 3 4 **ISSUE PRESENTED**

5 Issue No. 1: Does the adoption of Clark County Resolution No. 2008-01-18 effectively  
6 repeal the *de facto* comprehensive plan amendment adopted through the MOU?

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8 Issue No. 2: Did the County provide for early and continuous public participation in the  
9 adoption of the MOU in compliance with RCW 36.70A.020(11), RCW 36.70A.035, and RCW  
10 36.70A.140 and Clark County Code Ch. 40.560 through the adoption of Clark County  
11 Resolution No. 2008-01-18?

### 12 13 **DISCUSSION**

14  
15 ***Issue No. 1: Does the adoption of Clark County Resolution No. 2008-01-18 effectively***  
16 ***repeal the de facto comprehensive plan amendment adopted through the MOU?***

#### 17 **Positions of the Parties**

18 The County argues that Resolution No. 2008-01-18 “makes it clear that the County will not  
19 effectuate the MOU unless the Hearings Board Order is overturned.”<sup>10</sup> This commitment,  
20 the County urges, “goes well beyond the effects of the determination of invalidity entered by  
21 the Hearings Board which, under RCW 36.70A.302, focuses upon vesting of development  
22 applications.”<sup>11</sup>

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25 Petitioners argue that the County has failed to repeal the MOU.<sup>12</sup> The County could not  
26 implement and enforce the MOU anyway, Petitioners claim, since the Board has declared it  
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30 <sup>8</sup> Resolution 2008-01-18, Section 1.

31 <sup>9</sup> *Ibid* at Section 2.

32 <sup>10</sup> Clark County Compliance Hearing Memorandum at 3.

<sup>11</sup> *Ibid*.

<sup>12</sup> Petitioners’ Response to Clark County’s Hearing Memorandum at 2.

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1 to be invalid.<sup>13</sup> Further, the issue is not the enforceability of the contract, Petitioners argue,  
2 but the compliance of the land use action taken in it.<sup>14</sup>  
3

#### 4 **Board Discussion**

5 Based on the direction from the Court of Appeals that the MOU constitutes a *de facto*  
6 comprehensive plan amendment, this Board found that the MOU fails to comply with the  
7 public participation requirements of the GMA.<sup>15</sup> The County's promise not to implement or  
8 enforce the provisions of the MOU does not constitute a repeal of the comprehensive plan  
9 amendment. The MOU remains in effect and the County's agreement not to enforce it does  
10 not alter its effectiveness. In fact, the Cowlitz Tribe has made it clear that it will enforce the  
11 provisions of the MOU:  
12

13       It is the continuing position of the Tribe that our government-to-government  
14       relationship memorialized in the MOU remains a valid and binding contract between  
15       the County and the Tribe.<sup>16</sup>

16 The Resolution itself does not preclude the County from changing its mind with respect to  
17 the MOU, and anticipates that it will do so if the decision of the Board is "judicially  
18 overturned." If the Board were to find that the Resolution achieved compliance, there would  
19 be no basis for Board jurisdiction if the County were to change its mind and decide to  
20 enforce its provisions. Also, a finding of compliance would at least arguably moot the  
21 existing judicial appeal.  
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24 Had the County requested it, the Board might accept a commitment such as is found in the  
25 Resolution as a basis for rescinding a determination of invalidity. If the County agrees not  
26 to accept applications, thereby precluding them from vesting, the County can accomplish  
27 the same thing as a determination of invalidity and prevent inconsistent development  
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30 <sup>13</sup> *Ibid* at 3.

31 <sup>14</sup> *Ibid*.

32 <sup>15</sup> Order on Motions on Remand,

<sup>16</sup> Letter from Cowlitz Indian Tribe to Clark County, dated January 8, 2008; Exhibit 2 to Clark County

Compliance Hearing Memorandum

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1 applications from vesting during the period of compliance remand. Here, however, the  
2 County expressly stated that only a finding of compliance would meet its needs, since it  
3 wishes to be eligible for state grants.<sup>17</sup>  
4

5 **Conclusion:** The commitment made in Resolution 2008-01-18 not to implement or enforce  
6 the provisions of the MOU does not constitute a repeal of the *de facto* comprehensive plan  
7 amendment embodied in the MOU.  
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9 **Issue No. 2: Did the County provide for early and continuous public participation in**  
10 **the adoption of the MOU in compliance with RCW 36.70A.020(11), RCW 36.70A.035,**  
11 **and RCW 36.70A.140 and Clark County Code Ch. 40.560 through the adoption of Clark**  
12 **County Resolution No. 2008-01-18?**

### 13 **Positions of the Parties**

14 The County does not assert that it adopted Resolution No. 2008-01-18 in accordance with  
15 its own public participation plan for comprehensive plan amendments or RCW  
16 36.70A.020(11), RCW 36.70A.035, and RCW 36.70A.140.  
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18 Petitioners argue that the County has held no public hearings and solicited no public  
19 comment on the MOU.<sup>18</sup> They note that the County could have incorporated the MOU into  
20 its pending comprehensive plan revision process but failed to do so.<sup>19</sup>  
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### 22 **Board Discussion**

23 The Board's Order on Motions on Remand found that the County had failed to comply with  
24 RCW 36.70A.020(11), RCW 36.70A.035, and RCW 36.70A.140 and Clark County Code  
25 Ch. 40.560 when it adopted the MOU. This finding was based on the County's stipulation  
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31 <sup>17</sup> Oral argument, February 7, 2008.

32 <sup>18</sup> Petitioners' Response to Clark County's Hearing Memorandum at 1.

<sup>19</sup> *Ibid.*

1 that it had not followed its GMA processes in approving the MOU, since the County did not  
2 believe it was amending its comprehensive plan.<sup>20</sup>

3  
4 Since the County has not repealed the MOU, the *de facto* comprehensive plan amendment  
5 continues to fail to comply with the public participation requirements for adoption of such a  
6 legislative land use action under the GMA. Resolution No. 2008-01-18 was not adopted in  
7 conformity with the County's public participation plan either.<sup>21</sup>

8  
9 **Conclusion:** The County has not taken any action to comply with the requirements for  
10 public participation in the adoption of its *de facto* comprehensive plan amendment in the  
11 MOU. It therefore continues to be in non-compliance with RCW 36.70A.020(11), RCW  
12 36.70A.035, and RCW 36.70A.140 and Clark County Code Ch. 40.560.

#### 13 14 15 **FINDINGS OF FACT**

- 16 1. Clark County is located west of the crest of the Cascade mountains and is required to  
17 plan pursuant to RCW 36.70A.040.
- 18 2. Petitioners are the original petitioners in this case.
- 19 3. The Petition for Review in this case was filed on May 3, 2004 and challenged the  
20 adoption of Clark County Resolution No. 2004-03-02.
- 21 4. On July 23, 2004, this Board entered an order dismissing the petition based on lack  
22 of subject-matter jurisdiction.
- 23 5. The Court of Appeals reversed the Board's determination that it lacked subject-matter  
24 jurisdiction on the basis that the MOU constitutes a *de facto* comprehensive plan  
25 amendment in *Alexanderson v. Board of County Commissioners*, 135 Wn. App. 541  
26 (Division II -2006).
- 27 6. On remand, on June 15, 2007, this Board found, among other things, that "Clark  
28 County did not provide for early and continuous public participation in the adoption of  
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32 <sup>20</sup> Order on Motions on Remand.

<sup>21</sup> County response to Board questions at oral argument.  
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1 the MOU in violation of RCW 36.70A.020(11), RCW 36.70A.035, and RCW  
2 36.70A.140 and Clark County Code Ch. 40.560.”

3 7. On January 29, 2007, the Clark County Board of Commissioners adopted Resolution  
4 No. 2008-01-18, providing:

5 “Unless the Hearing Board’s June 19, 2007 Order on Motion on Remand is  
6 overturned on further appellate court review, Clark County will not seek to implement  
7 or enforce its provisions.”

8  
9 8. The County seeks a finding of compliance based upon the adoption of Resolution  
10 No. 2008-01-18.

11 9. Any finding of fact later determined to be a conclusion of law is adopted as such.

### 12 **CONCLUSIONS OF LAW**

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14 A. The Board has jurisdiction over the parties and subject-matter of this compliance  
15 case.

16 B. Resolution No. 2008-01-18 did not repeal the *de facto* comprehensive plan  
17 amendment embodied in the MOU.

18 C. Resolution No. 2008-01-18 did not comply with RCW 36.70A.020(11), RCW  
19 36.70A.035, and RCW 36.70A.140 and Clark County Code Ch. 40.560 in providing  
20 early and continuous public participation in the adoption of the *de facto*  
21 comprehensive plan amendment embodied in the MOU.

22 D. The MOU continues to fail to comply with RCW 36.70A.020(11), RCW 36.70A.035,  
23 and RCW 36.70A.140 and Clark County Code Ch. 40.560.

24 E. Any conclusion of law later determined to be a finding of fact is adopted as such.  
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### 27 **ORDER**

28 The County is ordered to achieve compliance with the GMA and this order within 180 days  
29 of the date of this order. The following schedule shall apply:  
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Compliance Due	August 15, 2008
Compliance Report and Index to the Record Due (County to file and serve on all parties)	August 22, 2008
Any Objections to a Finding of Compliance Due	September 12, 2008
County's Response Due	October 3, 2008
Compliance Hearing (location to be determined)	October 9, 2008

DATED this 20<sup>th</sup> day of February 2008.

\_\_\_\_\_  
Margery Hite, Board Member

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Holly Gadbow, Board Member

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James McNamara, Board Member

Pursuant to RCW 36.70A.300 this is a final order of the Board.

**Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out in WAC 242-02-832. The original and three copies of the petition for reconsideration, together with any argument in support thereof, should be filed by mailing, faxing or delivering the document directly to the Board, with a copy to all other parties of record and their representatives. **Filing means actual receipt of the document at the Board office.** RCW 34.05.010(6), WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

**Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil



1 **Enforcement.** The petition for judicial review of this Order shall be filed with the  
2 appropriate court and served on the Board, the Office of the Attorney General, and all  
3 parties within thirty days after service of the final order, as provided in RCW  
4 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,  
5 but service on the Board means actual receipt of the document at the Board office  
6 within thirty days after service of the final order.

7 **Service.** This Order was served on you the day it was deposited in the United States  
8 mail. RCW 34.05.010(19)  
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